Supreme Court, U.S.
FILED
SEP 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-230

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

SAVINGS LEAGUE OF WISCONSIN, LTD., EQUITABLE SAVINGS & LOAN ASSOCIATION, LIBERTY SAVINGS & LOAN ASSOCIATION, and MARATHON COUNTY SAVINGS & LOAN ASSOCIATION,

Appellants,

v.

THE WISCONSIN DEPARTMENT OF REVENUE and W. MICHAEL LEY, as secretary of the Department of Revenue,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF WISCONSIN, DISTRICT IV

MOTION TO DISMISS OR AFFIRM

DONALD J. HANAWAY
Attorney General
F. THOMAS CREERON, III *
Assistant Attorney General
EDWARD S. MARION
Assistant Attorney General
Attorneys for Appellees
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-5366

*Counsel of record.

QUESTIONS PRESENTED

1. Did the appellants fail to properly raise the questions regarding the purpose and effect of the Wisconsin corporate franchise tax in the state courts?

2. Does there exist a substantial federal question, in light of the several decisions of this Court holding that a franchise tax measured by net income is constitutional notwithstanding that interest from federal obligations are included in the measure of the tax?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iv

Cases.....iv

Wisconsin Statutes.....vi

Other Authorities.....vi

ARGUMENT.....1

I. THIS APPEAL SHOULD BE DISMISSED FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION IN LIGHT OF THE SEVERAL DECISIONS OF THIS COURT UPHOLDING STATE FRANCHISE TAXES MEASURED BY NET INCOME INCLUDING INTEREST FROM FEDERAL OBLIGATIONS.....1

A. The constitution permits state taxation measured by income, including interest on federal obligations.....1

B. Title 31 U.S.C. § 3124(a) permits state franchise taxation measured by income, including interest on federal obligations.....6

Page

C. The Wisconsin tax is a bona fide franchise tax.....7

1. Wisconsin's purpose in enacting the franchise tax law is irrelevant.....7

2. The economic effect of the statute has nothing to do with its validity.....14

3. Wis. Stats. sec. 71.01(2) is a bona fide franchise tax because it can have no application independent of the corporation's enjoyment of the privilege of exercising its franchise.....20

II. APPELLANTS FAILED TO PROPERLY PRESENT THEIR ISSUES RELATING TO THE ALLEGED PURPOSE AND EFFECT OF THE WISCONSIN TAX IN THE STATE COURTS.....24

CONCLUSION.....27

Page

TABLE OF AUTHORITIES

Cases

American Bank & Trust Co. v. Dallas County, 463 U.S. 855 (1983)....7, 19

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).....15, 16

Dept. of Revenue v. First Union Nat. Bk., 513 So.2d 114 (Fla. 1987), appeal dismissed, 108 S. Ct. 1253 (1988).....2

Educational Films Corporation v. Ward, 282 U.S. 379 (1931).....3-4, 5, 8-9, 20-21, 22

First American Nat. Bank of Olsen, 751 S.W.2d 417 (Tenn. 1987), appeal dismissed sub nom First American National Bank of Knoxville v. Taylor, 108 S. Ct. 1460 (1988).....2

First Nat. Bank of Atlanta v. Bartow County Bd., 105 S. Ct. 1516 (1985).....7

Flint v. Stone Tracy Co., 220 U.S. 107 (1911).....2, 22

Garfield Trust Co. v. Director, Div. of Tax., 508 A.2d 1104 (N.J.), appeal dismissed, 107 S. Ct. 390 (1986).....2

Home Ins. Co. v. New York, 134 U.S. 594 (1890).....3

Page

Macallen Co. v. Commonwealth of Massachusetts, 279 U.S. 620 (1929).....8, 12, 13

Memphis Bank and Trust Co. v. Garner, 459 U.S. 392, 103 S. Ct. 692 (1983).....19-20

Pacific Co. v. Johnson, 285 U.S. 480 (1932).....2, 4-5, 9-10, 11

Peo. of the State of New York ex rel. Northern Finance Corporation v. Lynch, 290 U.S. 601 (1933).....2

Phillips Chemical Co. v. Dumas Ind. Sch. Dist., 361 U.S. 376 (1960), accord, Washington v. United States, 460 U.S. 536.....13

Reuben L. Anderson-Cherne, Inc. v. Com'r of Taxation, 226 N.W.2d 611, appeal dismissed, 423 U.S. 886 (1975).....13

Society for Savings v. Coite, 6 Wall. 594 (1867).....3

Spector Motor Service v. O'Connor, 340 U.S. 602 (1951).....16, 17

Tradesmen Nat. Bank v. Oklahoma Tax Comm., 309 U.S. 560 (1940).....2, 5-6, 11

United States v. Detroit, 355 U.S. 466 (1958).....12-13

Page

Werner Machine Co. v. Director of Division of Tax, 31 N.J. Super. 444, 107 A.2d 36, aff'd, 17 N.J. 121, 110 A.2d 89 (1954), 350 U.S. 492 (1956).....3, 13, 14, 17-18, 23

Wisconsin Statutes

Sec. 71.01(2).....14, 17, 22

Sec. 71.042(2).....27

Other Authorities

Sec. 209, New York Tax Law.....3

31 U.S.C. § 742.....18

31 U.S.C. § 3124.....6, 18, 19

31 U.S.C. § 3124(a).....6

Hellerstein, State Taxation, Corporate Income and Franchise Taxes (1983), sec. 7.1, pp. 263-66.....3

Powell, The Waning of Intergovernmental Tax Immunities, 58 Harv. L. Rev. 633 (1945).....3

The appellees move to dismiss this appeal or, in the alternative, to affirm the judgment of the Court of Appeals of Wisconsin, on the ground that the question presented by the appellants is so insubstantial as not to warrant further argument and that, in any event, the appellants failed to properly present their case in the state courts.

ARGUMENT

I. THIS APPEAL SHOULD BE DISMISSED FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION IN LIGHT OF THE SEVERAL DECISIONS OF THIS COURT UPHOLDING STATE FRANCHISE TAXES MEASURED BY NET INCOME INCLUDING INTEREST FROM FEDERAL OBLIGATIONS.

A. The constitution permits state taxation measured by income, including interest on federal obligations.

As certainly as the states cannot tax the interest on federal obligations,

the states can tax corporate franchises although measured by net income, including such interest. Tradesmens Nat. Bank v. Oklahoma Tax Comm., 309 U.S. 560 (1940); Peo. of the State of New York ex rel. Northern Finance Corporation v. Lynch, 290 U.S. 601 (1933); Pacific Co. v. Johnson, 285 U.S. 480 (1932); Educational Films Corporation v. Ward, 282 U.S. 379 (1931); Flint v. Stone Tracy Co., 220 U.S. 107 (1911); First American Nat. Bank v. Olsen, 751 S.W.2d 417 (Tenn. 1987), appeal dismissed sub nom First American National Bank of Knoxville v. Taylor, 108 S. Ct. 1460 (1988); Dept. of Revenue v. First Union Nat. Bk., 513 So.2d 114 (Fla. 1987), appeal dismissed, 108 S. Ct. 1253 (1988); Garfield Trust Co. v. Director, Div. of Tax., 508 A.2d 1104 (N.J.), appeal dismissed, 107 S. Ct. 390 (1986); Reuben L. Anderson-Cherne,

Inc. v. Com'r of Taxation, 226 N.W.2d 611, appeal dismissed, 423 U.S. 886 (1975); Hellerstein, State Taxation, Corporate Income and Franchise Taxes (1983) sec. 7.1, pp. 263-66; Powell, The Waning of Intergovernmental Tax Immunities, 58 Harv. L. Rev. 633 (1945).[1]

The issue was fully considered by this Court in Educational Films. Section 209 of the New York Tax Law, entitled "Franchise tax on corporations based on net income," imposed an annual tax on all corporations "[f]or the privilege of exercising its franchise . . . in a corporate or organized capacity . . . to

---

[1]Equally clearly, the states can tax corporate franchises measured by the value of property, including federal obligations. Home Ins. Co. v. New York, 134 U.S. 594 (1890); Society for Savings v. Coite, 6 Wall. 594 (1867); Werner Machine Co. v. Director of Division of Tax, 31 N.J. Super. 444, 107 A.2d 36, aff'd, 17 N.J. 121, 110 A.2d 89 (1954), 350 U.S. 492 (1956).

be computed . . . upon the basis of [the corporations'] entire net income . . . ." 282 U.S. at 385 n.1. The definition of net income expressly included "all dividends received on stocks and all interest received from federal. . . bonds." Id. at 386.

In rejecting the taxpayer's challenge to the tax, the Court stated that while the instrumentalities of the federal government cannot directly be taxed, "the privilege of exercising the corporate franchise" can be taxed although the measure of the tax includes income or property which can not directly be taxed. Id. at 388.

The issue was presented again in Pacific Co. The "California Bank and Corporation Franchise Tax Act" imposed a tax on corporations "for the privilege of doing business within the State,"

measured by net income, including "all income received from federal . . . bonds." 285 U.S. at 488. The taxpayer contended that the tax was "in effect" a tax on income and prohibited. The Court rejected the challenge on the authority of Educational Films and earlier decisions.

In Tradesmens Nat. Bank, the Court considered a portion of the "Oklahoma Income Tax Law" laying a tax on national banking associations doing business in that state, measured by net income, including interest on federal obligations. Reviewing its earlier decisions, the Court stated:

> The power of a state to levy a tax on a legitimate subject, such as a franchise, measured by net assets or net income including tax-exempt federal instrumentalities or

> their income is likewise well settled.

309 U.S. at 564.

In summary, the constitution permits the states to impose corporate franchise taxes measured by net income, including interest on federal obligations. This is precisely what the Wisconsin statute does.

B. Title 31 U.S.C. § 3124(a) permits state franchise taxation measured by income, including interest on federal obligations.

Title 31 U.S.C. § 3124 authorizes a state to levy "a nondiscriminatory franchise tax . . . imposed on a corporation," although such a tax requires "the interest on [federal] obligation[s] . . . to be considered in computing [the] tax."

The appellants do not contend that the Wisconsin tax is discriminatory. Therefore, the tax is permissible under this statute. See First Nat. Bank of Atlanta v. Bartow County Bd., 105 S. Ct. 1516 (1985); American Bank & Trust Co. v. Dallas County, 463 U.S. 855 (1983).

C. The Wisconsin tax is a bona fide franchise tax.

1. Wisconsin's purpose in enacting the franchise tax law is irrelevant.

The appellants contend that the Wisconsin tax is invalid because it allegedly was enacted for the purpose of reaching otherwise untaxable income. Assuming the accuracy of this contention, it is irrelevant.

As already noted, this Court has refused to attempt to assess motive in

judging the constitutionality of state franchise tax laws measured by income, including interest on federal obligations. In only one case, Macallen Co. v. Commonwealth of Massachusetts, 279 U.S. 620 (1929), did the Court consider legislative purpose in enacting a franchise tax. This decision, however, has been repudiated by the Court.

In Educational Films, the taxpayer, like the appellants herein, pointed to statutory amendments as allegedly evincing an improper intention to tax federal obligations, and relied, like the appellants, on Macallen. The Court stated:

> Reference is made to the legislative history of the statute.
>
> . . . .
>
> There is nothing to suggest that the Legislature could at any time have had in mind the addition of income from copyrights to the measure

> of the tax, or that the statute or the amendments were adopted "for the very purpose of subjecting" it "pro tanto to the burden of the tax," which was declared to be the vice of the statute in Macallen Co. v. Massachusetts, supra, page 631 of 279 U.S., 49 S. Ct. 432, 73 L. Ed. 874. That the royalties play some part in the measure of the tax is the result of the application of the general language of the statute to particular circumstances to which the statute makes no specific reference.

Educational Films, 282 U.S. at 393-94.

Allegedly improper legislative motive was considered at length in Pacific Co. The Court tracked the history of the California franchise tax and determined that there was a purpose to reach federal obligations, but that such a purpose did not invalidate the statute.

> The view that a tax, although levied on a taxable subject, may be deemed invalid because purposely devised to include a non-taxable subject in its measure, receives only a

> limited and qualified support from Miller v. Milwaukee, supra. . . . [O]n its face, did [the statute] more than exhibit an intention of the one sovereignty to include in the dividends taxed, those derived from income from a non-taxable instrumentality of the other, together with income from all other sources. That admittedly would have been permissible; [citations omitted]. But it was the exclusion from the measure of the tax of all income except from federal bonds which rendered the tax invalid.
>
> . . . .
>
> But the present case is not one of discrimination. There is no attempt, as in Miller v. Milwaukee, supra, to measure the tax by exempt income while excluding from the measure all taxable income. The state seeks to do only what its contract permits it to do, to measure the franchise tax by all the net income of the taxpayer.

Id. at 492-94. The Court also rejected the taxpayer's reliance upon Macallen:

> But the state of California, in its legislation, has indulged in no reversal of policy so far as the measure-

> ment of the franchise tax is concerned and in no discrimination either in favor of or against tax exempt income. The entire history of its legislation discloses only that it has sought, in good faith, to conform its scheme of taxation of corporations to a permitted method of taxing national banks, to avoid discrimination against the latter. It has effected its purpose by adopting, in a single legislative act, a new form of privilege tax on corporations measured by their net income, without any form of discrimination as to the sources of the income included in the measure, differing in this respect in no material way from the similar tax upheld in Flint v. Stone Tracy Co. and in Educational Films Corporation v. Ward, supra.

Pacific Co. at 494-95.

Finally, in Tradesmens Nat. Bank, the Court again discounted legislative purpose in judging a franchise tax.

In all three cases just discussed, the legislative history disclosed support for the claim that state tax laws were either created or amended for the purpose

of including interest on federal obligations in the measure of a franchise tax. In each case, the Court held that the state legislature was doing no more than taking advantage of its constitutional right to include such interest. Macallen (to the limited extent it was recognized as having any "vitality") was limited to its unique facts.

Macallen was questioned by the Court again in United States v. Detroit, 355 U.S. 466, 472 n.2 (1958):

> The Government also places reliance on Macallen Co. v Massachusetts, 279 US 620, 73 L ed 874, 49 S Ct 432, 65 ALR 866. The weight of that case as a precedent was substantially impaired by its narrow distinction in Educational Films Corp. v Ward, 282 US 379, 392, 75 L ed 400, 407, 51 S Ct 170, 71 ALR 1226, and the reasoning of the Court in Pacific Co. v. Johnson, 285 US 480, 495, 76 L ed 893, 899, 52 S Ct 424. Later in New York ex rel. Northern Finance Corp. v.

> Lynch, 290 US 601, 78 L ed 528, 54 S Ct 230, a case which seems indistinguishable from Macallen on its facts, the Court in a per curiam opinion upheld the same kind of state tax which it had struck down in Macallen.

The Court explicitly held that Macallen "no longer has precedential value" in Phillips Chemical Co. v. Dumas Ind. Sch. Dist., 361 U.S. 376, 382 (1960), accord, Washington v. United States, 460 U.S. 536, 542 n.5.

The New Jersey court in Werner Machine Co. stated: "The dicta in the Macallen case has not borne any healthy progeny, and has subsequently attained prominence more by reason of its circumvention than by its adoption." 107 A.2d at 38. The court rejected the taxpayer's contention that the Legislature's purpose to include the value of federal obligations in computing a franchise tax measured by net worth

invalidated the tax. The court stated: "[T]he mere intent of the Legislature to do that which the constitution permits can not deprive legislation of its constitutional validity on account of the motives that may have inspired it." Id. at 38. This Court affirmed the decision of the New Jersey courts, in the basis of its earlier decisions, without even considering the motive or purpose of the state legislature. Werner Machine Co., 350 U.S. 492.

2. The economic effect of the statute has nothing to do with its validity.

The appellants argue that this Court must disregard the Wisconsin Legislature's characterization of Wis. Stats. § 71.01(2) as a franchise tax and hold that it is an income tax because the

"economic effect" of the two taxes are the same. This argument should be rejected. In the first place, the Court cannot determine the economic effects of the franchise and income taxes because no findings on these questions of fact were made or even sought below. In the second place, economic effect is not material to the validity of the tax.

The appellants cite Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), for the proposition that it is "absurd" and "practically impossible" to distinguish between an income tax and a franchise tax measured by income (Jurisdictional Statement at 16). The Court did not state anything nearly like the appellants' assertion. The language the appellants rely upon is a composite of the last sentence of one paragraph, discussing the application of the rule of

one case to the facts of another, and a sentence from the middle of a paragraph four pages later, in a different context entirely.

At 430 U.S. at 285, the Court was comparing two Commerce Clause cases: one permitting the taxation of income from interstate commerce and the other prohibiting the taxation of a franchise measured by the same net income. What the Court found "absurd" was, not the distinction between an income tax and a franchise tax measured by net income, but the Court's decision in Spector Motor Service v. O'Connor, 340 U.S. 602 (1951), invalidating the franchise tax measured in part by income earned in interstate commerce. Far from departing from its long-standing recognition of the distinction between income and income-measured franchise taxes, the Court, in

overruling Spector, was giving effect to franchise taxes measured by interstate income.

In the second sentence quoted by the appellants (430 U.S. at 289), the Court stated that the use of particular words in a taxing statute does not "necessarily" carry with it any economic significance and does not answer whether the tax produces a "forbidden effect." This statement alone is unassailable, but the "forbidden effect" is a burden on interstate commerce, which has nothing to do with this case or the analysis appropriate to determine the validity of Wis. Stats. § 71.01(2).

In analyzing the validity of state franchise taxes the Court has not looked beyond the face of the statute to examine economic effects. In Werner Machine Co., the Court considered the question:

> Appellant argues further that even if this is a franchise tax, it must fall because its effect is the same as if it had been imposed directly on the tax-exempt federal securities. Since the tax remains the same whatever the character of the corporate assets may be, no claim can be sustained that this taxing statute discriminates against the federal obligations. And since this is a tax on the corporate franchise, it is valid despite the inclusion of federal bonds in the determination of net worth. This Court has consistently upheld franchise taxes measured by a yardstick which includes tax-exempt income or property, even though a part of the economic impact of the tax may be said to bear indirectly upon such income or property.

350 U.S. at 493-94. Moreover, 31 U.S.C. § 3124, explicitly allowing franchise taxes measured by federal obligations, contains no economic criteria; the franchise tax must only be nondiscriminatory.

Referring to 31 U.S.C. § 742, the predecessor of § 3124, the Court recently

observed that the Court has long recognized as valid the distinction between a tax "on" federal obligations (invalid) and a tax on a "discrete transaction," such as a franchise, only measured by income or the value of federal obligations, even though this distinction is "formal but economically meaningless." American Bank & Trust Co., 103 S. Ct. at 3372.

Thus, even if economic effect were relevant, the only prohibited effect would be discrimination against the United States. In a recent decision applying 31 U.S.C. § 3124, the Court stated: "Where . . . the economic but not the legal incidence of the tax falls on the federal government such a tax generally does not implicate the constitutional immunity if it does not discriminate against holders of federal

property or those with whom the Federal Government deals." Memphis Bank and Trust Co. v. Garner, 459 U.S. 392, 103 S. Ct. 692, 696 (1983).

Thus, even if the economic incidence of the Wisconsin tax fell on the federal government, the tax is valid since the federal government is not discriminated against.

3. Wisconsin Stats. § 71.01(2) is a bona fide franchise tax because it can have no application independent of the corporation's enjoyment of the privilege of exercising its franchise.

In Educational Films Corporation, the taxpayer attacked New York's corporate franchise tax measured by net income as "in reality a tax on income,

and as such falls within the class of taxes which concededly may not be directly imposed on federal instrumentalities." 282 U.S. at 387. The Court looked to "the operation" of the tax to determine its true character:

> If we look to the operation of the present statute, it is plain that it can have no application independent of the corporation's enjoyment of the privilege of exercising its franchise. If appellant had ceased to do business before November 1, 1929, it would not have been subject to any tax under this statute, although it had received, during its preceding fiscal year, income which the statute makes the measure of the tax. Since it can be levied only when the corporation both seeks or exercises the privilege of doing business in one year and has been in receipt of net income during its preceding fiscal year, the tax, whatever descriptive terms are properly applicable to it, obviously is not exclusively on income apart from the franchise.

Id. at 388.

Like the statute upheld in Educational Films Corporation, Wis. Stats. § 71.01(2), can have no application independent of a corporation's enjoyment of the privilege of exercising its franchise.

Wisconsin Stats. § 71.01(2), Stats., is entitled "FRANCHISE TAX ON CORPORATIONS," and imposes on corporations a tax "[f]or the privilege of exercising its franchise or doing business in this state in a corporate capacity." This, the Legislature's characterization of the tax as a franchise tax, must be respected.

In interpreting a tax statute to determine the true nature of the tax imposed, "the declaration of the lawmaking power is entitled to much weight." Flint, 220 U.S. at 145 (upholding a state tax as a franchise notwithstanding its effect on federal

property). In rejecting a taxpayer's claim that a self-styled franchise tax was really an income tax, the Court in Werner Machine Co., 350 U.S. at 493, held it significant that "the statute expressly declares [the tax] to be a franchise tax." The California Supreme Court had earlier ruled that the tax was a bona fide franchise tax. This Court found "no basis . . . for not accepting" that conclusion. Id. at 493.

Similarly, the Wisconsin tax declares itself to be a franchise tax and the Wisconsin courts have upheld it as such. This court has no basis for not accepting this result.

II. APPELLANTS FAILED TO PROPERLY PRESENT THEIR ISSUES RELATING TO THE ALLEGED PURPOSE AND EFFECT OF THE WISCONSIN TAX IN THE STATE COURTS.

In their Jurisdictional Statement, the appellants contend that the purpose of the Wisconsin corporate franchise tax is undisputably to tax otherwise exempt federal obligations (Jurisdictional Statement at 6, 11). This is not true. Appellant's complaint did not allege what the purpose of enactment of the corporate franchise tax was. The parties' stipulation of facts was silent with respect to the purpose of the tax. The appellants moved for summary judgment, alleging that there were no disputed material facts requiring a trial. The state took the position that the purpose of the enactment of the tax was not a material fact. The state trial court

made no findings of fact regarding purpose.[3]

Purpose is a question of fact. Since this fact was never litigated in the state courts, it cannot properly be reviewed in this Court.

The appellants contend that the economic effect of the Wisconsin tax is the same as if it were a tax on income. As in the case of the alleged purpose of the tax, the alleged economic effect of the tax was not litigated in the state courts. The complaint did not allege what the economic effect of the tax was

---

[3]The appellants inform the Court that the trial court "did not address" the issue of purpose (Jurisdictional Statement at 7). This is not surprising since purpose was not placed in issue by the appellants.

nor was effect mentioned in the party's stipulation of facts.[4]

Again, we note that it was the appellants who moved for summary judgment, alleging no factual disputes. Nowhere in the record will the Court find a basis for concluding that economic effect was litigated to any extent whatsoever. Thus, far from demonstrating that the economic effect of the Wisconsin franchise tax is the same as that of an income tax, the appellants waived their opportunity to attempt to do so by moving for summary judgment.

Finally, the appellants present to this Court for the first time changes in the Wisconsin statutes which they believe

---

[4]This could explain why, as stated in the appellants (Jurisdictional Statement at 7, 8), the trial court did not address effect and why the court of appeals did not address it "explicitly."

further jeopardize the constitutionality of the Wisconsin tax (Jurisdictional Statement at 19, 21, 22). None of these changes have been presented to the state courts.[5]

CONCLUSION

Since this Court has so frequently upheld the propriety of tax statutes such as the Wisconsin Corporate Franchise Tax, since the appellants have, in any event, failed to properly raise questions of the purpose and effect of the Wisconsin tax in the state courts and since the appellants have never presented for review by the Wisconsin courts the

---

[5]The appellants concede that a change in Wis. Stats. § 71.042(2) was made while a petition for review of the decision of the court of appeals was pending in Wisconsin Supreme Court (Jurisdictional Statement at 22 n.7). Yet, they did not call it to the Wisconsin Supreme Court's attention.

statutory amendments argued in their Jurisdictional Statement, this Court should either dismiss the appeal or affirm the decision of the Court of Appeals of Wisconsin without further briefing or argument.

DONALD J. HANAWAY
Attorney General

F. THOMAS CREERON*
Assistant Attorney General

EDWARD S. MARION
Assistant Attorney General

Attorneys for Appellees

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-5366

---

*Counsel of record.